In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-978

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,

Petitioners,

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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The implication running throughout respondents' ("EPA's") brief in this case is that Congress through a "legislative oversight" simply omitted to specify in the statute that EPA was to promulgate effluent limitations by regulation for the existing industrial plants in this nation.[1] EPA's arguments by indirection ask this Court in effect to supply the provisions which purportedly were inadvertently or erroneously omitted.

[1] At one point in its brief EPA said—"Although Section 301 does not explicitly provide that it is the Administrator who is to establish the effluent limitations, that is its clear and necessary implication." (EPA's Brief in No. 75-978 ("EPA's Br."), at 36-37.) Otherwise, EPA's brief largely skirts the specific source for its asserted power to issue effluent limitations directly by regulation for existing plants.

It was a student commentator who used the phrase "legislative oversight" in addressing Congress's failure to provide that effluent limitations be issued by the Administrator through the mechanism of regulations. Casenote, IV *Fordham Urban Law Journal*, 623, 631 (1976).

There is no gap or lacuna in the Act. This is therefore not a situation where interim agency action is required to cure an unintended legislative omission, pending dispositive action by Congress. Instead, EPA's present arguments in support of a statutory power to set effluent limitations directly by regulation for existing plants stem from its own general policy preferences. Because EPA fears that States may be "lax" in applying the Act (App. 193, R. 6501), the Agency prefers not to accord meaningful powers to States to prescribe effluent limitations as Congress contemplated. To give effect to its preferences, EPA has claimed the power to set binding across-the-board effluent limitations, notwithstanding the fact that EPA's preferences have no statutory support.

EPA's bare assertions should not govern this Court's decision in the present case, especially since Congress did not accept the policy underlying those assertions. This Court has rejected similar efforts by agencies to rewrite statutes, efforts premised on policy goals not accepted by Congress and not written into legislation. This Court said of one such effort by the Interstate Commerce Commission: "Neither the Court nor the Commission is warranted in departing from those [statutory] standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen." *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489 (1942). Cf. *Union Electric Co.* v. *Environmental Protection Agency*, ——U.S.——, 44 U.S.L.W. 5060, 5064-5065 (June 25, 1976).

The Federal Water Pollution Control Act as written by Congress places substantial authority in States with EPA-approved permit programs. These States are obliged to set discharge permits for particular plants, and in these permits the States are to apply the "guideline" regulations which Section 304(b) of the Act explicitly requires EPA to issue. The particular allocation of responsibility between the States and the Federal EPA currently reflected in the Act is a creation of Congress, reached after considering the statutory objectives in light of principles of federalism. It should be given a chance to work. Unless and until Congress acts to revise its handiwork, EPA should be directed to follow "the course which Congress has chosen." (*Id.*)

I.

EPA's CURRENTLY ASSERTED POSITION CONSTITUTES AN UNWARRANTED *VOLTE FACE* FROM ITS ORIGINAL AND CONTEMPORANEOUS CONSTRUCTION OF THE ACT

EPA strenuously argues that its construction of the Act is "reasonable" and therefore that "the Court should uphold it" without a great deal of questioning. (EPA's Brief at 34-35.) Petitioners' arguments based upon the statutory language are dismissed as "hypertechnical or insignificant distinctions in the wording" of the Act. (*Id.* at 26.)

EPA also claims that the Administrator made known shortly after the enactment of the 1972 Amendments that it would "establish both guidelines under Section 304(b) and effluent limitations under Section 301(b)." (*Id.* at 35 n.25.) EPA uses this factual claim as a basis for the argument that its present interpretation of the Act was adopted contemporaneously with the enactment of the 1972 Amendments, that it has been consistently followed thereafter, and that its interpretation thus is entitled to be accorded some weight. (*Id.*)

Petitioners contest EPA's factual claims; petitioners also controvert EPA's arguments based on those claims.[2] Fortunately, the full administrative record is before the Court,[3]

[2] In a confusing footnote EPA cites the regulations reprinted in the Appendix to petitioners' brief (not the brief itself) as support for an assertion that petitioners "recognize [that] the effluent limitations were established by regulations." (EPA's Br. at 77, n.53.) Petitioners certainly "recognize" that EPA has *asserted* that it has implied authority under Section 301 to issue effluent limitations by regulations and that EPA *argues* it has exercised that implied authority. Petitioners' "recognition" ends there.

[3] A complete copy of the administrative record is on file with the Clerk of this Court. See Pet. Br. at 1 n.2.

and thus this factual dispute may be resolved with confidence.

The record shows the following sequence of events:

Before the enactment of the 1972 Amendments in mid-October 1972, EPA had developed what it called "guidance" documents for use with the Refuse Act Permit Program. EPA makes no mention of these documents. (Compare Pet. Br. at 14-15.) Respecting the inorganic chemicals industry, both the contractor's July 1971 report (R. 3183-3325, especially R. 3310-3314, 3316) and the October 1972 EPA guidance document (App. 8-20, R. 2550-2567) set out the guidance as ranges of effluent values.[4] EPA also contemplated that factors to guide the selection of a value from the range for a particular plant would be supplied via an EPA technical briefing. (App. 8-9, R. 2551.) The value selected would become part of the particular plant's permit. (R. 2552.) In short, the guidance documents looked like guideline regulations to be issued under Section 304(b). They were not bare single-number limitations binding upon all relevant plants.

EPA looks to the request for proposals issued by EPA on October 31, 1972, to obtain a contractor to study the inorganic chemicals industry, and claims that this request shows the Agency to have contemplated even at that early date that it would issue limitations by regulation in addition to guideline regulations. (EPA's Br. at 14-15, 35 n.25.) This claim does not withstand an examination of the record.

EPA's overall request for proposal is set out in the record at R. 6016-6281. EPA's own conception of its responsibili-

[4] In these guidance documents, EPA occasionally referred to the actual range of numerical values set out for each pollutant parameter as "limitations". See, *e.g.*, R. 2562, where EPA said, "The effluent guidelines are based on process wastewater . . ." in referring to the entire guidance document, and at the same time said, "The effluent limitations shown in Attachments A and B are average values . . ." in referring to the range of numbers for the particular parameters making up the guidelines.

ties in October of 1972 is set out at R. 6026. EPA then spoke only of issuing regulations in the form of guidelines for existing plants under Section 304(b) and standards for new sources under Section 306:

> "DESCRIPTION OF THE REQUIREMENT
>
> "A. *Introduction*
>
> "The Federal Water Pollution Control Act Amendments of 1972 (the "Act") requires the United States Environmental Protection Agency to establish effluent limitations which must be achieved by point sources of discharges into the navigable waters of the United States. *Section 301 of the Act requires the achievement by July 1, 1977, of effluent limitations* which require the application of the 'best practicable control technology currently available,' and the achievement by July 1, 1983, of effluent limitations which require the application of the 'best available technology economically achievable.'
>
> "Within one year of enactment, *the Administrator is required by Section 304(b) to promulgate regulations providing guidelines for the effluent limitations required to be achieved under Section 301 of the Act.* These regulations are to identify in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available and best available technology economically achievable. *The regulations must also specify factors to be taken into account* in identifying the two statutory technology levels and *in determining the control measures and practices which are to be applicable to point sources* within given industrial categories or classes to which the effluent limitations apply.
>
> (R. 6026 (emphasis added).)

Notably, EPA then viewed Section 301 as setting the overall objective to be "achieved" by existing plants. It stated that the regulations it was to issue were "guideline"

regulations under Section 304(b).[5] These guideline regulations were to contain factors "to be taken into account" in making determinations respecting the application of "technology levels" to "point sources", *i.e.*, to individual plants. (*Id.*) The resulting effluent limitations for the plant were those "required to be achieved under Section 301 . . . ." (*Id.*)

Petitioners accept the interpretation of the Act adopted by EPA at that time and argue in support of it here.

EPA cites two segments of the request for proposal as evidence of an intent on its part to promulgate effluent limitation regulations under Section 301. (See EPA's Br. at 15 & n.15, citing R. 6027, 6034.) These segments speak of effluent limitations in terms of a "range of parameters" to be "presented by the contractor." (R. 6034.)[6] The segments also state that certain "minimum factors" (which were specified in the request)[7] "should be identified" by contractors for use "in ultimately applying such levels to individual plants within the category in issued permits . . . ." (*Id.*) EPA's directions to its prospective technical contractors thus did not contemplate issuance of limitation regulations under Section 301; that section is nowhere associated with regulations. And where the Agency spoke in terms of limitations it was using the term in the sense of numbers for pollutant parameters which, along with the concurrently specified factors, were to make up the guideline regulations issued under Section 304(b). (See also *supra*, at 4 n.4.) These guideline regulations would form the basis for values fixed in permits. (R. 6034.)

The contract actually issued by EPA to General Technologies Corp. ("General Technologies") is equally as instructive respecting EPA's contemporaneous construction of the Act. In the contract EPA required General Technologies "to propose suggested draft effluent limitations guidelines" which reflected ranges and specified factors. (R. 6399.) Permits for individual plants could then be issued which could "require compliance with slightly different effluent limitations depending upon the presence of one or more of the factors specified." (*Id.*) Again, the

[5] The request for proposal also stated—"The Act requires the guidelines . . . to be developed within very strict deadlines. . . ." (*Id.*) The only "deadlines" for guideline regulations are contained in Section 304(b). Section 301(b) fixes the dates when the broad technological objectives are to be achieved but contains no "deadlines" for regulations.

[6] The cited portion of EPA's request is as follows:

"Item IV. *Outline of Level I, II and III Control and Treatment Technology*

. . .

"EPA will of course exercise its independent judgment in determining what levels of technology satisfy these statutory terms for each industry for which *effluent limitations guidelines* and standards of performance for new sources *are to be promulgated.* . . . Therefore, the following description of Level I, II and III technology is merely a suggested outline to be used by contractors in responding to Appendices A and B of Part II of this RFP which requires the final report to set forth suggested effluent limitations and standards of performance.

"The end result of the analysis undertaken by contractors will be the suggestion of effluent limitations associated with the technology identified by the contractor as Level I, II and III technology. In many, if not most instances, this assessment of Levels I, II and III technology will vary slightly depending upon such factors as the age and size of given plants within the industry and the type of production process employed. *The minimum factors which must be taken into account in establishing Levels I, II and III technology for each industrial category, and in ultimately applying such levels to individual plants within the category in issued permits, are included in the outline below.* [See *infra*, n.7.] Other factors may also be pertinent and should be identified by the contractor where appropriate. Since a range of technology will satisfy the requirements of Levels I, II and III in some instances, effluent limitations consistent with the application of such technology will also vary. *Consequently a range of parameters may be presented by the contractor.* Effluent limitations and standards of preformance [sic] shall specify the quantity of pollutants which may be contained in the effluent discharge. This quantity shall be related either to a unit quantity of product produced or raw material used in the production process, whichever shall most clearly determine the maximum degree of pollution reduction. If the contractor finds that expressing effluent limitations and standards of performance in such terms is not possible, he shall indicate an alternative method of expression and explain why such an alternative is necessary."

(R. 6034-6035 (emphasis added).)

[7] EPA's request lists the factors identified in Sections 304(b)(1)(B) and 304(b)(2)(B). (R. 6035.)

Agency used the words "effluent limitation", but as adjectives in the phrase "effluent limitation parameters" in describing the numbers which appear in the guidelines or, alternatively, as a descriptive term for the numerical effluent conditions in a particular permit selected as a result of the application of the factors. (*Id.*)[8]

[8] The relevant text of the contract is as follows:

"SUGGESTED EFFLUENT LIMITATIONS GUIDELINES—FORMAT

"Once the range of technology is established for each industrial category, then a determination must be made as to what constitutes Level I and Level II control and treatment technology as outlined under Item IV of the Scope of Work. *In addition, factors* similar to those used in assessing what constitutes Level I and Level II *must be specified which should be taken into account in applying the effluent limitation parameters* associated with each of these levels of technology. *Permits* issued to individual plants within the industrial category *may then require compliance with slightly different effluent limitations depending upon the presence of one or more of the factors specified.* The contractor is to propose suggested draft effluent limitations guidelines incorporating this analysis and utilizing the suggested outline of technology Levels I and II set forth under Item IV of the Scope of Work."

(R. 6399 (emphasis added).)

The contract then went on to require that the "suggested effluent limitation guidelines" contain effluent limitations parameters and the list of factors:

"*The suggested effluent limitation guidelines* for each industrial category *must contain* the following:

"A. An identification of the industrial categories and subcategories covered.

"B. Effluent limitations required for each such category.

"1. An identification of Level I and II control and treatment technologies.

"2. For each technology level identified, *a statement of the permissible amounts of discharge* constituents expressed in terms of (i) unit quantities per unit of either material used in the industrial process or units of products resulting from that process, or (ii) concentrations, whichever shall most clearly determine the maximum degree of pollution reduction.

"3. *List the factors* which should be taken into account in determining Level I and II control and treatment technology for particular plants and consequently in determining permissible effluent levels for such plants."

(*Id.* (emphasis added).)

The contract also contained an attachment setting out a "Notice" which EPA required General Technologies to include as a preface to its report. (R. 6424.) The report resulting from the contract was to be distributed to the public, and EPA wanted no doubts to arise respecting its purpose or its standing. The notice again emphatically states that EPA was looking toward guideline regulations to be issued under Section 304(b), and not issuance of limitations directly by regulation under Section 301:

"*The regulations to be published by EPA under Sections 304(b)* and 306 of the Federal Water Pollution Control Act, as amended, will be based to a large extent on the report and the comments received on it. However, *pursuant to Sections 304(b)* and 306 of the Act, EPA will also consider additional pertinent technical and economic information which is developed in the course of review of this report by the public and within EPA. . . . [P]rior to final promulgation of regulations, an EPA report will be issued setting forth EPA's conclusions concerning the subject industry, *effluent limitations guidelines* and standards of performance applicable to such industry. Judgments necessary to promulgation of *regulations under Sections 304(b)* and 306 of the Act, of course, remain the responsibility of EPA."

(R. 6424 (emphasis added).)

The EPA contract with General Technologies was effective January 9, 1973, and actually signed on May 21, 1973. (R. 6378.) Pending completion of the contract and consequent proposal and promulgation by the Agency of the guideline regulations, EPA had to provide assistance to its Regional Offices which were struggling with discharge permit applications. That assistance took the form of a Memorandum to All Regional Permit Program Directors from the Office of Permit Programs, Washington, D. C., dated May 1, 1973. A copy of this memorandum is on file in the Library of this Court. The memorandum instructed EPA's regions to use the "effluent guidance documents" for "the issuance of permits under Section 402" on an interim basis "until effluent guidelines are promulgated under Section 304." (*Id.* at 1.) The "guidance package" attached

to the memorandum spoke of limitations only in the context of the numerical values set for each of the relevant pollutant parameters in a given plant's permit. (*Id.*, attached "interim effluent guidance" at 5.)

Subsequently, EPA's "Advance Notice of Public Review Procedures" issued in August 1973 (38 *Fed. Reg.* 21202, App. 21, R. 4330), referred only to guideline regulations to be issued under Section 304(b); it did *not* refer in any respect to limitation regulations under Section 301. (Compare Pet. Br. at 15-16 with EPA's Br. at 16.) References to Section 301 were to the fact that it required plants to achieve the statutory technological objective by a specified date.

The same interpretation was expressed by EPA in its October 1973 notice of proposed rulemaking respecting the particular regulations at issue in these cases. (38 *Fed. Reg.* 28174, App. 61-62, R. 4861-4862.) EPA did not express a contrary view until Assistant Administrator Kirk wrote his letter of January 15, 1974, supporting "nationally uniform standards" because he feared States would be too "lax" in applying the guideline regulations. (App. 193, R. 6501.) Even then, Assistant Administrator Kirk tried to fit such "nationally uniform standards" into the framework of guideline regulations. (App. 192-193, R. 6501.) The final break with EPA's contemporaneous construction of these key sections did not come until Assistant Administrator Kirk's February 1974 memorandum, when he finally claimed that the EPA regulations for existing plants were also limitations being issued under Section 301. (See Pet. Br. at 20.)

EPA seeks to avoid the thrust of this history, detailed on the record in these cases, by offering a redefinition of the "phrase 'effluent limitations guidelines' to encompass [EPA's] combination of action under Section 301(b) and Section 304(b) into a single proceeding." (EPA's Br. at 16 n.16.) EPA's effort at redefinition will not square with its own regulations; it only demonstrates the weakness of the Agency's position. The general definitions in EPA's

regulations, applicable to all industry-category guidelines and new source standards, explicitly define "effluent limitations guidelines", a term not used in the Act, as regulations issued *pursuant only to Section 304(b)*, not Section 301:

> "(j) The term 'effluent limitations guidelines' means any effluent limitations guidelines issued by the Administrator pursuant to Section 304(b) of the Act." [9]

(40 C.F.R. § 401.11(j), Pet. Br. Appendix C, at 5c.) See also Pet. Br. at 19-20.

The record in these cases thus demonstrates the "about face" from the Agency's original, contemporaneous interpretation of the Act. EPA's present interpretation is entitled to no judicial deference whatsoever. *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 279-280 (1966); *cf. Train* v. *Colorado Public Interest Research Group, Inc.*, ——U.S.——, 44 U.S.L.W. 4717, 4719 n.8 (June 1, 1976). And because of the circumstances, no reliance by private parties or by the Government has arisen to entrench a construction of the statute which "ought not now to be disturbed." *Stuart* v. *Laird*, 1 Cranch [5 U.S.] 299, 309 (1803).[10]

Indeed, some branches of EPA still have not adapted to the new interpretation of the statute proffered by the Agency. In June of this year, after this Court had granted *certiorari* in the present case, EPA published a small book of questions and answers respecting the Act. The first two questions and answers were as follows:

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[9] Section 401.10 sets forth the scope and purpose of these General Provisions—

> "This Part 401 sets forth the legal authority . . . which will apply to all regulations issued concerning specific classes and categories of point sources under Parts 402 through 699 of this subchapter which follow." (*Id.* at 3c.)

Part 415 of the subchapter contains the regulations for the inorganic chemical category.

[10] The doctrine of according deference to an agency's contemporaneous construction of a statute is a refinement and offshoot of the early recognition of the importance of reliance as a legitimate consideration in statutory interpretation.

"What is an effluent limitation guideline?

"An effluent limitation guideline sets forth the *degree of reduction* of a pollutant that is *attainable through the application of various levels of technology*. The guidelines are developed by EPA based on the total body of known information on effluents from a particular industry.

"What is an effluent limitation?

"An effluent limitation is a *restriction* on the amount of a pollutant that may be released from a point source into a body of water. These limitations, based on EPA's effluent limitations guidelines, are spelled out in the discharge permits each industry must obtain in order to discharge pollutants into the Nation's waterways."

(Environmental Protection Agency, *No Small Task—Establishing National Effluent Limitations Guidelines and Standards*, at 2 (June 1976) (emphasis in the original.) [11]

The foregoing quotation reflects EPA's original interpretation of the statute, and not the interpretation presented in the court of appeals and now in this Court. Petitioners urge this Court to adopt EPA's original interpretation as constituting a faithful adherence to the mandate of the Act.

II.

PUBLISHING A "DEVELOPMENT DOCUMENT" ALONG WITH AN "ECONOMIC ANALYSIS" DOES NOT SATISFY THE MANDATE OF SECTION 304(b) THAT GUIDELINE REGULATIONS BE ISSUED

EPA never really comes to grips with Section 304(b). Section 304(b) expressly provides that "the Administrator shall . . . publish . . . regulations, providing guidelines for effluent limitations . . . ." The section further provides that these regulations shall "identify . . . [the] effluent reduction

[11] Copies of this EPA publication are on file with the Librarian of this Court.

attainable through the application of best practicable control technology currently available for classes and categories of point sources . . ." (§ 304(b)(1)(A)), and shall "specify factors to be taken into account in determining the control measures to be applicable point sources . . . within such categories or classes." (§ 304(b)(1)(B).) The section goes on to list in detail the factors to be specified. The guideline regulations are given purpose by Section 301(b) which speaks of determining effluent limitations "in accordance with regulations issued by the Administrator pursuant to Section 304(b)(2) of this Act." (§ 301(b)(2)(A), see also § 301(b)(1)(A).)

EPA has now at least acknowledged the statutory command that regulations be issued under Section 304(b). (EPA's Br. at 13, 48-59, and especially 55.) But in the Agency's view, these regulations take on a strange form and have no practical purpose. EPA claims that the Development Document and the Economic Analysis,[12] while not "formally designated" as regulations, "in practical effect" meet the requirements of Section 304(b). (EPA's Br. at 76-77; see also *id.* at 10, 21, and 26.)

The Exhibit Volume of the Appendix is made up solely and entirely of EPA's Development Document and its Economic Analysis for the segments of the inorganic chemicals industry covered by the EPA regulations at issue here. There are 519 pages of rambling verbiage in the two items. These must be the strangest "regulations" any Federal agency has ever issued. They are not codified in the Code of Federal Regulations. They have no continuing purpose or legal effect. At this juncture, copies of the documents are not readily available, even from EPA itself. EPA's brief discusses these "regulations" only to explain them away. The arguments by EPA underline the Agency's efforts to render Section 304(b) a dead letter, a statutory anachronism. (See EPA's Br. at 13, 48-59, 76-77.)

[12] In EPA's view, the guideline regulations apparently may include in addition to these documents "the preamble to the formal regulations in issue and the regulations themselves." (EPA's Br. at 77; see also *id.* at 21.)

There is nothing "compelling" about an interpretation that would elide an entire section from the Act. (Compare EPA's Br. at 46.) By referring to Section 304(b), petitioners are not putting forward "a series of hypertechnical arguments that focus on minor distinctions in the wording of various sections of the Act . . . ." (*Id.*) And particularly, petitioners are not contending that any requirements be "read into the Amendments." (*Id.* at 54.) To the contrary, petitioners argue only that explicit requirements in the statutory words not be overriden and eliminated by EPA's implications. EPA would have this Court rewrite the statute to eliminate the mandate for guidline regulations in Section 304(b) and to put in its stead through implication a new permissive authorization for limitations by regulation under Section 301.

EPA asserts that its implied authority under Section 301 allows it to look at the provisions of 304(b), to select certain of the requirements set out in that section, and to deal with these selected requirements in its own way in regulations purportedly issued under Section 301. For example, petitioners have pointed out that Section 304(b) explicitly requires guideline regulations to

> "specify factors to be taken into account in determining the control measures and practices to be applicable *to point sources . . . within such categories or classes.*"
>
> (§ 304(b)(1)(B) (emphasis added).)

(See Pet. Br. at 63-73.) Notwithstanding this statutory language, ERA argues that guideline regulations under Section 304(b) were not intended for use by permit authorities because no analysis of the factors is to be made in the permit process to apply the factors to a particular plant's situation. (EPA's Br. at 58-59.) Despite the fact that Section 304(b) directs EPA to specify the factors in regulations, EPA says it "considered" the factors in establishing subcategories and that ends the matter. (*Id.* at 58.) To go any further, the Agency says, would be to "encompass wholesale reconsideration at the permit granting stage of all the factors." (*Id.* at 59.) The discussion which follows demonstrates that EPA is trying to discredit the statutory plan to achieve its goal of binding limitations issued by regulation.

The subcategories adopted by EPA for the inorganic chemicals industry reflect only differences in product types, and in a very few cases, processes.[13] Section 304(b)(1)(B) also lists as factors, to be specified in regulations,

> "the age of equipment and facilities involved, . . . the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate. . . ."[14]

None of these factors is reflected in EPA's subcategories. And it is no answer to say that the Agency considered the possible application of these other factors and rejected them. As the court of appeals noted in *du Pont II*, "[s]ome of the specified factors are of practical applicability only to individual plants, for example, 'age of equipment and facilities involved.'" (App. 266.) The district court in the *Grain Processing* case reached precisely the same conclusion. See *Grain Processing Corp.* v. *Train*, 407 F. Supp. 96, 103-104 (S.D. Iowa 1976), *appeal pending*, No. 76-1233 (8th Cir.). The Third Circuit is in accord. *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027, 1043-1044 (3d Cir. 1975).

Moreover, the Act provides that the listed factors relate to "the assessment of best practicable control technology currently available" (Section 304(b)(1)(B)).[15] Thus both

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[13] A number of subcategories encompass plants making a variety of products within one general product type. An example is the Sodium Silicate Subcategory. See *infra*, at 19.

Process distinctions were made in the hydrogen peroxide and titanium dioxide subcategories. (Pet. Br. Appendix B, at 44b-49b, 71b-79b.)

[14] Cost is also a consideration. The Section lists as a factor "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." (§ 304(b)(1)(B).)

[15] Section 304(b)(2)(B) contains similar language regarding the factors for 1983-step guideline regulations.

the Administrator and the permit-issuing authorities are engaged in the assessment of technology, the Administrator doing so for whole categories and classes (subcategories) of sources and the permit-issuing authorities for individual sources. Both must consider the enumerated factors. The Administrator must specify them in the regulations issued under Section 304 to guide the permit officer. The permit-issuing authority must apply them in granting permits for individual plants. If the Administrator consults the factors listed in Section 304(b) to determine a range of acceptable discharges for a group of sources, the permit issuer can intelligently place an individual source within that range only by reference to the *same* factors as they bear on the individual source.

The Senate Public Works Committee, mentioning as examples several factors included in Section 304(b), made it clear that Congress intended that both the Administrator and the permit-issuing authority would apply the *same* factors:

> "In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. *These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls.* In effect, . . . the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. *In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant.*" (S. Rep. No. 92-414, 92d Cong., 1st Sess., at 50 (1971), 2 *Leg. Hist.* at 1468 (emphasis added).) [16]

Secondly, EPA places great emphasis on the statement in the Conference Report that effluent limitations applica-

[16] As noted in Pet. Br. at 60, several of the courts of appeals have been troubled by the fact that the legislative history is in conflict over whether the factors set out in Section 304(b) should be applied to particular plants in permit proceedings. Portions of the legislative history in conflict with the above-quoted excerpt from the Senate Report are set out in EPA's brief at 57-59. There is, however, no ambiguity in the statute.

ble to individual plants within a category or class be "as uniform as possible." (EPA's Br. at 61, citing S. Rep. No. 92-1236, 92d Cong., 2d Sess., at 126 (1972), 1 *Leg. Hist.* at 309.) But the Report made clear it did not mean *identical* limitations applicable to all plants in a category or class. Rather, the conferees, speaking of Section 304, indicated that "the Administrator is expected to be precise in his guidelines under subsection (b) of this section," so that "*similar* point sources with *similar* characteristics . . . will meet *similar* effluent limitations." (*Id.* (emphasis added).) [17] The role of the guideline regulations was to enable the permit authorities to identify which point sources have "similar characteristics" so that "similar effluent limitations" could be imposed. Permit authorities could thereby provide uniformity of treatment without force-fitting plants into a single identical limitation regardless of differences in their "characteristics" as judged according to the relevant "factors".

In addition, because the statute speaks of applying the factors "to point sources . . . within such categories or classes" (§ 304(b)(1)(B)), EPA's original interpretation of the Act provided that the factors would be specified in the regulations and would be taken into account in issuing permits for particular plants. (See R. 6026, quoted *supra* at 6; R. 6034-6035, quoted *supra* at 8 n.4; R. 6399, quoted *supra* at 9-10 n.5.)

There is thus no "wholesale reconsideration" of factors by permit authorities. (Compare EPA's Br. at 59). The permit authorities should be guided by the factors and

[17] In view of the importance EPA attaches to this part of the Conference Report, the full text of the relevant paragraph in the Report is set out for the court's convenience:

> "Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class *be as uniform as possible*. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that *similar point sources with similar characteristics*, regardless of their location or the nature of the water into which the discharge is made, *will meet similar effluent limitations*." (S. Rep. No. 92-1236, 92d Cong., 2d Sess. at 126 (1972), 1 *Leg. Hist.* at 309 (emphasis added).)

apply them as EPA has specified them in proper guideline regulations. Because EPA has issued bare single-number limitations, it has barred any application of the factors to individual plants.[18] To support its actions EPA suggests that "generalized guidelines" would not provide sufficient specificity. (EPA's Br. at 65.) The Agency also cites the possibility of "varying views of the 27 States with approved permit programs" (*id.* at 66), and implies that some States may be too lax. EPA also complains that "each such State would be forced to hold lengthy adjudicatory procedures to consider anew the effluent limitations which the Amendments require." (*Id.*) These are spurious arguments. No cataclysmic series of events will occur if the statute is followed. EPA now has regulations prescribing an opportunity for hearings if a permit applicant disagrees with the determinations of a permit authority. (See 40 C.F.R. Parts 124 and 125, and especially 40 C.F.R. §§ 124.36 (respecting approved State authorities), 125.36 (where authority rests with EPA).) The statute itself contemplates such hearings. (See § 402(b)(3)—"an opportunity for public hearing before a ruling on each such application".) And the permit authorities are not to review the factors *de novo*; they are to select a particular limitation for each relevant pollutant parameter from the range provided in the regulations, upon consideration of the factors specified in the regulations.

EPA seeks also to rebuff petitioners' argument that the statutory language and the legislative history support regulations consisting of a range of pollutant values for each parameter. (Compare Pet. Br. at 65-69 with EPA's Br. at

[18] As noted, the issuance of a voluminous Development Document and Economic Analysis, both with no legal effect, does not comply with the statutory mandate that the regulations "specify" the factors. See *supra* at 12-13.

The present regulations do make an indirect reference to factors, but the factors themselves remain unspecified. EPA inserted into the regulations a provision allowing adjustment of the 1977-step values upon a showing that there are "fundamentally different" factors applicable to a particular plant. This provision likewise does not satisfy the specific directions in Section 304(b) as to the form and content of the guideline regulations. See *infra* at 30-31.

49-53.) EPA argues that Congress' "expectation has been satisfied." (EPA's Br. at 51.)

The Agency relies on two inconsistent arguments to support its assertion that its duty to specify a range of attainable pollution reduction for an industrial category has been fulfilled. First EPA contends that it has established ranges in the regulations by establishing subcategories for an industry and by setting a single-number limit for each subcategory, because the values for the subcategories, taken together, define a "range" for the entire category. (EPA's Br. at 51.) This argument contradicts the statute, which requires EPA to identify the reduction in terms of amounts of constituents for "*classes* and categories" of point sources. (§ 304(b)(1)(A)) (emphasis added); see also § 304(b)(2)(A).) A "class" is a subcategory of sources within an overall industry category. In addition, a "range" defined as EPA now would have it is of no use to the permit-issuing authorities for whose aid the guidelines are intended, for these authorities must issue permits to *single plants*, not to subcategories. The Act requires ranges of values in guideline regulations for classes (subcategories) as well as for categories because of the differences among individual plants in the class (subcategory). EPA's approach attempts to establish by simple fiat a non-existent homogeneity within each subcategory; here, for example it simply assumes homogeneity for plants producing a wide range of different types of sodium silicate varying by form (liquid or anhydrous—solid or powder), by chemical composition (sodium metasilicate, sodium orthosilicate, or sodium tetrasilicate), and by process (use of furnace or non-thermal reaction with caustic solution), where all plants fall within the same subcategory. (See Ex. R. 5629-5631; see also the opinion of the court of appeals in *du Pont II* at App. 281.)

EPA's second argument is that there is an *implicit* range of achievable effluent discharges, from the single-number limit set by the Administrator down to zero, and that this implicit range meets the requirements of the Act. (EPA's

Br. at 52.) The argument is without merit. The Section 304(b) regulations are meant to guide permit-issuing authorities. Specification of the maximum attainable pollution reductions, to guide permit issuers away from overly harsh restrictions which are not "practicable", is as important as the specification of minimum attainable reductions, to prevent unduly lax requirements for individual plants. The Conference Committee report (quoted *supra* at 17, n.17) shows the congressional intent that Section 304(b) guideline regulations be precise, so that national uniformity could be achieved within the system of State-issued permits established by the Act. As the report said, the goal of Section 304(b) is that "*similar* point sources with *similar* characteristics . . . will meet *similar* effluent limitations." (S. Rep. No. 92-1236, 92d Cong., 2d Sess., at 126 (1972), 1 *Leg. Hist.* at 309 (emphasis added).) Single-number regulations with an implicit range down to zero are necessarily ill-suited to guide permit-issuers called upon to grant equitable permits to the various plants because nothing in the regulations guides the permit officer in selecting a value in an implied range.

Even if the Act allowed the use of an implicit range defined by zero discharge at one extreme, such a range cannot be sustained in guideline regulations for segments of the inorganic chemicals industry. There is no evidence in the record, and it cannot be assumed, that a level of pollutant discharges at zero or close to it is attainable by application of either 1977-step or 1983-step technology to any existing point source in a number of subcategories. Absent such evidence, an implicit range including zero discharge cannot be sustained. See *American Iron & Steel Institute* v. *Environmental Protection* Agency, 526 F.2d 1027, 1046 (3d Cir. 1975).[19]

Overall, if EPA has never really come to grips with Section 304(b) in these cases, it can also be said that the court

[19] The courts of appeals have differed from one another over the requirement of an explicit range of values in Section 304(b) regulations. The Third Circuit, hewing closely to the language and plan of the Act, held that Section 304(b) guidelines must specify permissible ranges of effluent reduction, in order to serve their intended purpose as useful aids for permit-issuing authorities. *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027, 1044-1045 (3d Cir. 1975). The Second Circuit, ignoring the purposes underlying the requirement in this Act for ranges in the guidelines, concluded that single-number limits for each subcategory of an industry satisfy the statutory requirement because, taken together, they define a range for the entire industrial category. *Hooker Chemicals & Plastics Corp.* v. *Train*, 537 F.2d 620, 630 (2d Cir. 1976). The District of Columbia Circuit concluded that the Administrator can promulgate single-number effluent limitations pursuant to Section 301, and did not rule on any requirements for Section 304(b) effluent guideline regulations. *American Frozen Food Institute* v. *Train*, ____U.S. App. D.C.____, 539 F.2d 107, 131 (1976). The Seventh Circuit also did not address the issue. *American Meat Institute* v. *Environmental Protection Agency*, 526 F.2d 442, 448 n.13 (7th Cir. 1975). The Fourth Circuit in the present cases, *du Pont II* (App. 253-286), limited its holding on the point carefully by concluding that, for some categories, single-number limits might be permissible, as a statutory matter, but deciding whether a range is necessary in any particular regulation would involve factual determinations to be reviewed in other proceedings. (App. 265.) The court's holding was further qualified by its decision that EPA's regulations are only "presumptively applicable" to any individual point source. (*Id.*, App. 262.) Thus, the court envisioned a system of standards to be adjusted by permit-issuers, but without the guideline regulations of Section 304(b) to insure uniformity of treatment within the flexible system.

of appeals in *du Pont II* achieved mixed results in its grappling with the Section. The court's formula of "presumptively applicable" single-number limitations draws a compromise of sorts between the positions of the parties. The court would at least give some effect to the congressional requirement of Section 304(b) that factors be specified in the regulations. In the court's view, while EPA would not have to specify the factors in bare single-number limitation regulations, the factors could be applied in permit proceedings to set the permit limitations for a particular plant. (App. 266.)

Both petitioners and EPA are dissatisfied with the *du Pont II* decision. Yet while petitioners have sought review of the ruling by the court of appeals respecting the existing-plant regulations, EPA has not done so. EPA has sought review only of the court's ruling on new source standards. EPA nonetheless asserts that the decision by

the court of appeals in *du Pont II* "is inconsistent with the statute", at least where it "invites reconsideration by the permit issuer of factors already considered by the Administrator in establishing effluent limitations under Section 301 for existing sources." (EPA's Br. at 59 n.40.) [20] If EPA was dissatisfied with the decision of the court of appeals in *du Pont II* it should have said so in its cross-petition for writ of certiorari, not in a footnote in its brief filed on October 22, 1976.[21] See *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924); *cf. Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

The regulations Congress required be issued under Section 304(b) should not be relegated to the impotent form of a bulky and obscure "Development Document" and a similar "Economic Analysis". The guideline regulations were intended as the keystone for the Act's system of regulating discharges from existing plants. EPA should not be allowed, under the guise of exercising an implied authority under Section 301, to pick and choose among the requirements set out in Section 304(b) as to the form and content of the regulation and then to deal with these selected items as though Section 304(b) did not exist. The authority which EPA says can be implied from Section 301 cannot provide a satisfactory basis to disregard completely the statutory command in Section 304(b). Nor should implication be used to convert statutory requirements, such as the obligation to specify factors in the regulations,

[20] EPA cannot claim that the fault with the Fourth Circuit lies with the interpretation accorded the *du Pont II* decision in a subsequent case, *Appalachian Power Co.* v. *Train*, ____F.2d____, 9 E.R.C. 1033, 1038-1039 (4th Cir. 1976). In *du Pont II*, as in the *Appalachian Power* case, the Fourth Circuit ruled that "[i]n acting on permit applications, the issuer will properly consider cost/benefit analysis along with other factors specified in § 304(b)." (App. 28[illegible])

[21] Portions of the judgment as well as the opinion of the court of appeals are involved. The court of appeals, among other things, set aside the EPA's definition of "effluent limitations" in the concurrently-challenged general regulations (40 C.F.R. § 401.11(i), Pet. Br. Appendix C at 5c), because the definition in the regulations did not conform to the statutory definition in Section 502(11), nor to the court's view of "presumptively applicable" regulations. (See App. 261-262, 284.)

into permissive provisions contemplating mere "consideration" of the statutorily specified items by EPA. The statute is served neither by the compromise formulated by the court of appeals nor by EPA's more complete abandonment of Section 304(b).

III.

SECTION 301(b) SETS TECHNOLOGICAL OBJECTIVES AND SPEAKS OF REGULATIONS TO BE ISSUED UNDER SECTION 304(b); IT DOES NOT PROVIDE AN INDEPENDENT BASIS FOR REGULATIONS

EPA focusses on Section 301(b). Respecting regulatory power, that section stands in stark contrast to Section 304(b). Section 301(b) commands no regulations; it has no timetable for regulatory promulgation; it is not written with active verbs. The language of the section is wholly passive. Section 301(b) provides that

> "[T]here shall be achieved—
>
> "(1)(A) [by July 1977] . . . effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304 of this Act . . . .
>
> . . .
>
> "(2)(A) [by July 1983] . . . effluent limitations for categories and classes of point sources . . . which (i) shall require application of the best available technology economically achievable . . . as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act . . . ."

Section 301(b) does set technological objectives for discharges from existing plants. And it refers to regulations, but regulations required to be issued under Section 304(b), not under its own terms.

Congress wrote Section 301 without specifying *in that Section* who was to establish "effluent limitations" or how

such limitations were to be established. Congress's use of the passive voice in writing the Section allowed these key elements to remain unspecified. EPA has seized upon this circumstance to contend that it should be able to accord to itself a power to promulgate "limitations" in the form of regulations which have the effect of binding its regional offices and especially state permit authorities to "mechanically crank" the promulgated limitations into permits for particular plants.[22] EPA relies upon "clear and necessary implication" (EPA's Br. at 37), "interrelationship" (*id.* at 44), or assertions that such authority is "explicitly intended." (*Id.* at 33.)

Petitioners agree with EPA that Sections 301(b), 304(b) and 402 should be construed together to constitute a harmonious, corroborative statutory system. There is also agreement in general that "[t]he technological considerations defined under Section 304(b) are converted into effluent limitations under Section 301(b)" (EPA's Br. at 9), because such a statement acknowledges the linkage between these sections. But agreement stops there. Certainly there is no consensus on "[t]he operation of [EPA's present] procedure" (*id.* at 10.), as that procedure was modified by the Agency in late 1973 and 1974.

As EPA's original interpretation of the Act recognized, the roles of States and of permit proceedings are key considerations in construing these most important sections of the Act. The Act's general definition of "effluent limitation" puts these considerations in proper perspective:

> "The term 'effluent limitation' means any restriction established by a *State or the Administrator* on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are *discharged from point sources* into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."
>
> (§ 502(11), 33 U.S.C. § 1362(11) (emphasis added).)

[22] See *CPC International Inc.* v. *Train*, 515 F.2d 1032, 1037 (8th Cir. 1975) ("*CPC I*").

Notably, the definition places States before, or at least on the same footing with, the Administrator in addressing the question of who is to establish the limitations. Also, the definition bears on the matter of how the limitations are to arise. It speaks of restrictions on "discharge[s] from point sources", *i.e.*, particular plants, and it includes "schedules of compliance", which can only arise in discharge permits for particular plants.

EPA's present position bypasses these and many other statutory indicia, in favor of an emphasis on "uniformity" and "uniform national effluent limitations". (EPA's Br. at 26, 27, 34 n.24, 60, 62, 65.) EPA has carried its drive toward uniformity well beyond the statutory bounds.

Congress did speak of "uniformity". But it did not embrace the rigid, unbending uniformity EPA seeks; in the discussion of Section 304(b), not Section 301(b), the Conference Report spoke of limitations at individual plants which were "as uniform as possible". By that, the conferees meant "similar" limitations for "similar point sources with similar characteristics." [23]

This is not the rigid, mechanical, by rote uniformity which EPA would impose on the statute. "Similarity" does not mean "identity".[24]

Representative Blatnik, Chairman of the House Public Works Committee, warned against precisely the type of Federal "uniformity" which EPA's about-face interpretation seeks to invoke:

> ". . . [L]et us not kid ourselves that the Federal establishment operating by itself can implement an effective water quality program. Unless we have meaningful local and State participation and not a Federal dictatorship, the program will founder on the rocks

[23] The text of the relevant part of the Conference Report is set out *supra*, at 17 n.17.

[24] Compare EPA's Br. at 61 with Pet. Br. at 55, 57-61, and *supra*, at 16-17. See also R. Zener, *The Federal Law of Water Pollution Control*, in *Federal Environmental Law*, at 703 n.98 (E. Dolgin and T. Guilbert ed. 1974), quoted in Pet. Br. at 61.

> of the generally inflexible[,] Washington dictated approach." (118 Cong. Rec. 10206 (1972), 1 *Leg. Hist.* at 355.)

Representative Blatnik also addressed the other side of the coin—the matter of State adherence to EPA's guideline regulations:

> ". . . [T]his bill requires that State and regional programs follow stringent Federal guidelines. It will not allow the industrial equivalent of forum shopping. Each State's program will preclude this because they must be consistent with the guidelines." (*Id.* at 355-356.)

In short, Congress did not share EPA's subsequently-expressed fear that States would be too "lax". (App. 193, R. 6501.) Congress provided for States to accede to the permit-issuing role (§ 402(b)-(f)), and Congress as a matter of policy recognized "the primary responsibilities and rights of States" to regulate discharges. (§ 101(b).)

In the face of the statutory structure, EPA's arguments that Congress left to implication these most important regulations for existing plants are unpersuasive. When Congress desired to have EPA write standards as such, it knew how to express such a desire in explicit terms. As the Eighth Circuit noted in the *CPC I* case, "[o]ther sections of the Act demonstrate that the omission of such a provision [for limitations by regulation] was not oversight, for Congress provided unambiguously for the promulgation of national standards in other sections of the Act." *CPC International Inc.* v. *Train*, 515 F.2d 1032, 1038 (8th Cir. 1975) (*"CPC I"*). The Eighth Circuit cited national standards of performance for new sources (§ 306(b)(1)(B)), national standards for toxic pollutants (§ 307(a)(2)), and national pretreatment standards for both new and existing sources (§ 307(b) and (c)). As the Eighth Circuit said,

> "In providing for national standards in these areas, Congress did four things: (1) it used the term 'standards,' a word which takes on a special meaning because of its use under the Act; (2) it expressely provided that the standards were to be published by

> regulation; (3) it put deadlines on the process, requiring that the Administrator publish the standards within fixed periods of time; and (4) it provided that standards were to be enforceable independently of the permit system. *See* § 306(e); § 307(d)." (*Id.*, 515 F.2d at 1038.)

Congress did none of these things for limitations by regulations—it never spoke of such regulations at all. By way of contrast, for the guideline regulations under Section 304(b) it did all of the listed things except the last. And then, respecting enforceability, Congress provided that the limitations in the permits were to be the enforceable regulatory measures. (See § 309(a)(1), (a)(3), (c)(1), and (d).)

EPA's argument is especially difficult to accept because it would override a specific statutory mandate for guideline regulations with an authority which must be drawn purely from implication. As discussed in the opening brief (Pet. Br. at 35, 40), the fact that Congress so explicitly set out EPA's obligation to issue guideline regulations implies strongly that it denied to the Agency the power to do something different. *Durousseau* v. *United States*, 6 Cranch [10 U.S.] 307, 314 (1810); see also *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942).[25] Especially is this so where Congress has in other areas of the statute provided explicitly for the type of specific standards which EPA here seeks to imply.

There is one further circumstance which is even more compelling. With one exception, *Congress never required EPA to issue both regulations in the form of guidelines and regulations in the form of standards for the same subject matter.* It chose one or the other. For the one exceptional case, the legislative history notes carefully that EPA is to

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[25] Under the circumstances, EPA's position receives no support from Section 501(a), 33 U.S.C. § 1361(a), which grants the EPA Administrator authority "to prescribe such regulations as are necessary to carry out his functions under the Act." The question presented here is whether one of EPA's functions under the Act is to issue limitations by regulation. Compare EPA's Br. at 37.

issue both types of regulations and that the one authority is in addition to the other. The exceptional case arises respecting pretreatment standards for existing plants. Section 304(f)(1) requires EPA to issue pretreatment guidelines:

> "(f)(1) For the purpose of assisting States in carrying out programs under Section 402 of this Act, the Administrator shall publish within one hundred and twenty days after the enactment of this title, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works." [26]

Then Section 307(b) directs the Administrator in addition to issue proposed pretreatment standards within 180 days and to issue final pretreatment standards within 90 days thereafter. (Section 307(b)(3) authorizes the pretreatment standards to be published by categories of sources.) With reference to these provisions the Senate Report states:

> "[The Administrator] is also required to publish guidelines for establishing pre-treatment standards for pollutants discharged into publicly owned treatment works, and guidelines for establishing procedures and test protocols for the analysis of pollutants in permit applications. *It should be noted that this authority is in addition to the authority of the Administrator to establish pre-treatment standards directly under Section 307.*" (S. Rep. No. 92-414, 92d Cong., 1st Sess., at 54, 2 *Leg. Hist.* at 1472 (emphasis added).)

Finally, EPA relies (EPA's Br. at 37-38) heavily on Section 301(c) which provides that

> "The Administrator may modify the requirements of subsection (b)(2)(A) [1983 step] with respect to any point source for which a permit application is filed after July 1, 1977 upon a showing that . . . such modified requirement (1) will represent the maximum use

[26] Furthermore, the pretreatment guidelines to be issued under Section 304(f)(1) are not specifically required by the statute to be issued in the form of regulations. In contrast, Section 304(b) mandates promulgation of guideline regulations with a very explicit content.

> of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

EPA argues that there would be no need for this provision for case-by-case relief if the only way effluent limitations could be imposed is in permits rather than by regulation. (EPA's Br. at 38.)

EPA mistakes the thrust of Section 301(c). Section 301(c) authorizes the Administrator on a showing specified by the statute to relieve a particular point source from complying with the 1983-step technological criterion, reflected in the guideline regulations by ranges of pollutant values and by a specification of factors. In other words, Section 301(c) authorizes the Administrator to prescribe limitations for a particular "point source" which are more lenient than the most permissive of the values in the technology-based range set out in the guidelines. Section 301(c) thus gives the Administrator authority to sanction limitations for a particular plant which rest on a technology more lenient than the "best available technology economically achievable" which is specified as the objective for 1983 by Section 301(b)(2)(A).

Moreover, the language of Section 301(c) makes no reference whatsoever to "effluent limitations". Instead, the section refers to the "requirements of subsection (b)(2)(A)". In subsection (b)(2)(A), the requirements are spelled out as being the achievement of technology-based limitations "determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act". Thus by speaking of "requirements", Section 301(c) is in fact speaking of the 1983-step guideline regulations, as described in the foregoing paragraph. Undeterred, EPA points to the Third Circuit's remark that "§ 301(c) itself seems to support the Administrator's position by presupposing the existence of a section 301 effluent limitation which the Administrator can relax." EPA's Br. at 38, quoting *American Iron & Steel Institute* v. *Environ-*

mental Protection Agency, 526 F.2d 1027, 1037 n.15 (3d Cir. 1975). EPA then seeks to convert Section 301(c) into an argument for effluent limitations by regulation under Section 301(b). Both the comment by the court in the *American Iron & Steel* case and EPA's bootstrap argument ignore the precise language of Section 301(c), and try to make over the words of the Section into a different type of provision entirely.

Much the same difficulty arises with respect to a provision in all of EPA's 1977-step guideline regulations, referred to variously as a "modification" provision or a "variance" clause. The provision allows a permit authority to propose to the Administrator for his approval limitations for a particular plant different from the guideline values if "fundamentally different" factors are found to be present. (*E.g.*, 40 C.F.R. § 415.62, Pet. Br. Appendix B, at 31b-32b.) The Fourth Circuit has ruled that this clause is too restrictive because it does not allow permit authorities sufficient latitude to consider the factors required to be taken into account by Section 304(b)(1)(B) and (b)(2)(B). See *e.g., Appalachian Power Co.* v. *Train*, —F.2d—, 9 E.R.C. 1033, 1038-1039 (4th Cir. 1976). On the other hand, the provision was upheld in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 537 F.2d 642, 645-646 (2d Cir. 1976), but the Second Circuit there stated that it was not passing on the validity of the EPA modification provision as applied in a particular case. The Second Circuit expressed its reservations by observing that "[w]ithout variance flexibility, the program might well founder on the rocks of illegality." (*Id.*, 537 F.2d at 647.) [27]

Arguments respecting whether or not the EPA modification clause is too restrictive have an artificial ring in the context of the present cases, because these arguments are

[27] As the Second Circuit said: "Not all of the thousands of plants in operation can be expected to fit into prefabricated molds or templates. By specifying a permit procedure, Congress implicitly conferred on the *permit-grantor* the privilege of construing the broader regulations in light of the specific type of plant applying for the permit." (*Id.*, 537 F.2d at 647 (emphasis added).)

entirely dependent upon acceptance of EPA's basic contention that it can promulgate bare single-number limitations under Section 301(b). If the Act is properly construed, there should be no need for such a clause at all. EPA should issue guideline regulations complying with the explicit mandate of Section 304(b). Those guidelines would not need a special clause because they ordinarily would contain ranges of values for pollutant parameters and would always contain a specification of factors to guide selection of a number from each range.

The unnecessary controversy over the validity of the modification clause serves to emphasize the difficulties arising in trying to accommodate EPA's present position to the statute. If EPA can promulgate limitations by regulation, rather than having them set by permit authorities based upon guideline regulations, a number of statutory provisions either require strained interpretation to become workable, or become dead letters, or have unintended harsh effects.

IV.

THE ACT IS STRUCTURED FOR GUIDELINE REGULATIONS, NOT LIMITATIONS BY REGULATION

In the opening brief, petitioners pointed to a number of adverse collateral consequences which would arise with various provisions in the Act if guideline regulations were replaced by a force-fit promulgation of limitations by regulation. (Pet. Br. at 75-85.) EPA has responded by contending that "the other statutory provisions upon which petitioners rely are not inconsistent with promulgation of limitations by regulation" (EPA's Br. at 46 (capitalization omitted)), and further that "the interrelationship among various provisions" confirms EPA's authority. (*Id.* at 44 (capitalization omitted).)

EPA's response, however, conspicuously omits any mention of a number of the affected collateral provisions of the Act.

A. Advisory Committee Review

For example, EPA nowhere cites Section 515, which expressly calls for Advisory Committee review of proposed guideline regulations, along with new source standards and other mandated standards, but does not refer in any way to limitations by regulation. In pertinent part, Section 515 provides—

> "(b)(1) No later than one hundred and eighty days prior to the *date on which the Administrator is required to publish any proposed regulations required by section 304(b) of this Act*, any proposed standard of performance for new sources required by section 306 of this Act, or any proposed toxic effluent standard required by section 307 of this Act, he shall transmit to the Committee a notice of intent to propose such regulations. The Chairman of the Committee within ten days after receipt of such notice may publish a notice of a public hearing by the Committee, to be held within thirty days." (Emphasis added.)

Surely if Congress had intended the guideline regulations to be overridden by limitations regulations, it would have focussed the Advisory Committee's attention on the limitations regulations. It makes utterly no sense for the Committee to be concerned on the one hand with important new source standards and toxic effluent standards and on the other hand with guidelines which according to EPA do not even take on the form of actual regulations.

B. Periodic Revision of Permits and of Regulations

Similarly, EPA does not cite nor refer in any respect to Section 301(d). That Section calls for periodic review of limitations:

> "Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised under such paragraph."

EPA would rather ignore this Section because it, like Section 301(c), does *not* speak of limitations promulgated

by regulation under Section 301(b). (See *supra*, at 28-30.) Instead, Section 301(d) also carefully is written in terms of "[a]ny effluent limitation required by paragraph (2) of subsection (b) of this section." That precisely worded cross-reference, like the comparable reference in Section 301(c), is to technology-based limitations "determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act." (§ 301(b)(2).) Thus again, Section 301(d) in fact draws upon the 1983-step guideline regulations promulgated under Section 304(b).

And there is no conflict in the fact that Section 301(d) calls for periodic five-year review of limitations while Section 304 calls for review of the guideline regulations "at least annually." Section 301(d) is concerned with limitations determined in accordance with the guideline regulations. Those limitations actually appear in discharge permits. The permits are issued "for fixed terms not exceeding five years." (§ 402(b)(1)(B).) In sum, the guideline regulations themselves are to be reviewed at least annually, but because permits have up to five-year terms, review of the resulting limitations can occur on a periodic five-year basis and can reflect application of the revised guidelines in effect at the time of the permit renewal.

Provisions such as Section 301(d) illustrate that the statute may not be written in elegant or concise language but that the provisions do make sense if they are construed together.

C. Enforcement and Judicial Review

EPA also mangles Section 309, which provides for Federal enforcement of the Act. The Agency does not say so directly, but it appears to claim that power has to be implied for it to issue limitations by regulation or otherwise it will not be able to enforce directly any effluent regulations against existing plants. (See EPA's Br. at 45.) EPA at least complains that

> "none of [the provisions of Section 309] requires compliance with the guidelines promulgated under Section 304, authorizes enforcement proceedings against noncompliance therewith, or makes such noncompliance illegal." (EPA's Br. at 45.)

The complaint is not valid. Congress did *not intend* that the guideline regulations be directly enforceable, in contrast to national standards such as those issued under Section 306 (for new sources), 307(a) (for toxic pollutants), and 307(b) and (c) (for pretreatment). Direct enforcement would not be practicable for regulations which were written in terms of ranges of values with a specification of factors. Congress instead provided for enforcement of the limitations in the permits, which limitations would be derived from the guideline regulations. Section 309 explicitly so provides. See § 309(a)(1), (a)(3), (c)(1), and (d). Several portions of Section 309 do refer directly to a "violation of Section 301" (*e.g.*, § 309(c)(1)), but these references have nothing to do with effluent limitations by regulation; the references allow for enforcement by EPA of the bar in Section 301(a) against making any discharge without a permit, and of the bar in Section 301(f) against any discharge of "radiological, chemical, or biological warfare agent or high-level radioactive waste."

In the past, EPA has abjured any intent to create a massive new criminal code by implication. It should maintain that course. (See Pet. Br. at 79 n.69.)

EPA's about-face interpretation also creates problems with Sections 505 and 509, the provisions for citizen enforcement suits and for judicial review, apart from the jurisdictional issue in this case discussed *infra*. (See Pet. Br. at 80-84.) EPA's response (EPA's Br. at 41-43) misstates petitioners' arguments in several material respects, especially regarding the interplay of these sections with Section 301(c).[28] Both Sections 505(f)(2) and 509(b)

[28] Section 301(c) authorizes the Administrator to depart from the 1983-step requirements for a particular plant upon economic grounds, where a specified factual showing has been made. See *supra*, at 28-30.

(1)(E) refer to an "effluent limitation or other limitation under section 301 . . . [and other sections]." Both of these references encompass the Administrator's action pursuant to Section 301(c) to issue limitations for an individual point source. (Compare Pet. Br. at 80, 82 n.72, 84 n.74 with EPA's Br. at 42 n.28.) EPA wrongly asserts that petitioners would accord no meaning to the reference in Section 509(b)(1)(E) to "promulgating" limitations (EPA's Br. at 42 n.28); in fact petitioners argue that the reference is necessary to provide review of the Administrator's action to issue limitations under Section 301(c).[29] The reference does not support any implied limitations regulations under Section 301(b).

EPA also errs in stating petitioners' views respecting Section 505(f)(2). As EPA would have it, petitioners are arguing that Section 505(f)(2) allows citizens to "challenge" or seek review of the Administrator's action to issue limitations for a particular plant under Section 301(c). (See EPA's Br. at 43-44 n.30.) Petitioners do not take such a position. Section 505(f)(2) was included by Congress in the Act to allow citizens to sue to *enforce* limitations set by the Administrator acting under Section 301(c). If a citizen desired to seek review of the Administrator's action under Section 301(c), the citizen could bring a petition for review in a court of appeals under the authority provided by Section 509(b)(1)(E), as described *supra*, in the immediately preceding paragraph.

EPA in short has tried to turn aside petitioners' argument that EPA's present theory of implied authority for regulations would render useless portions of Sections 505 and 509, by making the same argument in reverse. (See EPA's Br. at 43.) Because EPA's attempt rests upon a double misstatement of petitioners' views, however, the

[29] Respecting a somewhat similar provision in the Clean Air Act, the word "promulgating" has been construed to include both the procedural and substantive aspects of a covered EPA action. See *United States* v. *Adamo Wrecking Co.*, —F.2d—, No. 75-1967 (6th Cir., decided November 1, 1976). See also *infra*, at 41 n.36, discussing *Mianus River Preservation Committee* v. *Environmental Protection Agency*, —F.2d—, 9 E.R.C. 1174 (2d Cir. 1976).

Agency has not addressed the real problems its position creates with the operation of Sections 505 and 509.

D. EPA Veto Power Over State Permits

Finally, EPA devotes only a brief footnote to Section 402(d). This Section empowers EPA to veto State discharge permits which are "outside the guidelines and requirements of the Act." (§ 402(d)(2).) This provision was the subject of intense consideration and debate in the House of Representatives. (See Pet. Br. at 51-55.) It was also the focus in the Conference Committee for resolving the relative allocation of power to the States and to EPA respecting permits. (Pet. Br. at 55-57.) Congressional action on Section 402(d) is most pertinent to this Court's resolution of this case. As the Eighth Circuit said in its *CPC II* decision:

> "Section 402(d)(2) expressly provides that the EPA may halt issuance of any state-issued permit if it determines that the conditions of the permit do not comply with the guidelines issued under § 304(b). See *id.* [515 F.2d] at 1037 n.11, 1038 and 1038 n.14. *The reference in this veto provision to the § 304(b) guidelines and the extensive debate which preceded the addition of § 402(d)(2) to the final draft of the statute are inconsistent with the EPA's contention that it has the power to issue effluent limitations for existing plants by regulation under § 301.* The District of Columbia Circuit and the Seventh Circuit ignore this language. The Third Circuit deals with the language, *see American Iron & Steel Institute* v. *E.P.A., supra,* at 1040-1041, but its reasoning is unpersuasive."
>
> (*CPC International Inc.* v. *Train*, ——F.2d——, 9 E.R.C. 1301, 1302 n.1 (8th Cir. 1976) (emphasis added).)

Without discussion, EPA summarily asserts in its footnote that "the term 'guidelines' here [in Section 402(d)] refers to guidelines under Section 304(h), concerning uniform monitoring, reporting, and information requirements,

not to Section 304(b)." (EPA's Br. at 45 n.31.) This is not correct.[30] Section 402(d)(2) was added to the bill during the Conference Committee deliberations, specifically to respond to the House debate over EPA's role in State-issued permits and over the weight to be ascribed to the guideline regulations under Section 304(b). (See Pet. Br. at 54-55; see also *supra*, at 25-26.) The summary offered by Senator Muskie during floor debate on the Conference Report in the Senate was not only explicit on the matter; it was emphatic. (See 118 Cong. Rec. 33698 (1972), 1 *Leg. Hist.* at 176, quoted in Pet. Br. at 56.) Moreover, EPA's original, contemporary construction of Section 402(d)(2) contradicts its present position. In September 1973, EPA's position was that—

> "After a state program is approved by EPA, *each permit* (except in categories that may be waived by EPA) *is subject to EPA review and veto to ensure its consistency* with requirements of the law, including deadlines, and *with EPA's effluent guidelines.*"
>
> (Council on Environmental Quality, *Fourth Annual Report*, at 175 (September 1973) (emphasis added).)

Again, EPA has had to distort the words of the statute and the intent of Congress to force-fit promulgation of limitations by regulation. This Court should not sanction EPA's about-face construction.

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[30] Congress made an express and explicit designation of guidelines under Section 304(h)(2) whenever it decided to refer to those "procedural" guidelines. § 304(h)(2); see §§ 402(c)(1); 402(e). Also, the explicit references to Section 304(h)(2) occur in the statute when the context indicates procedural matters would be pertinent. Still further, the references to Section 304(h)(2) were in the bill long before the Conference Committee revised Section 402(d) to resolve the matter of EPA veto of State-issued permits based upon the Section 304(b) guidelines. See, e.g., H. R. 11896, 92d Cong., 2d Sess., at §§ 402(c)(1) and (e) (which even at that time already contained references to Section 304(h)(2)), and § 402(d)(2) (which then contained no reference to any guidelines, because this House-passed bill limited any EPA veto of a State-issued permit to instances where a discharge in one State affected the waters of another State) (1972), 1 *Leg. Hist.* at 893, 1057-1059.

V.

THE JURISDICTIONAL ISSUE IS WHETHER COURTS OF APPEALS HAVE EXCLUSIVE JURISDICTION TO REVIEW EFFLUENT GUIDELINE REGULATIONS UNDER SECTION 304(b), WHERE THE COURT DETERMINES THAT EPA CANNOT ACCORD TO ITSELF BY IMPLICATION AN AUTHORITY TO PROMULGATE LIMITATIONS BY REGULATION UNDER SECTION 301(b)

EPA's arguments respecting jurisdiction miss the mark entirely. Petitioners did not and do not take the jurisdictional positions ascribed to them in EPA's brief. EPA has set up its own straw-man argument and has duly knocked it down.

Petitioners do not argue, as EPA says petitioners do,

> "that even if the Administrator has authority to promulgate effluent limitations under Section 301 (which are reviewable in the courts of appeals), the guidelines upon which those limitations are based are reviewable only in district courts."
>
> (EPA's Br. at 79.)

Most of EPA's argument on the jurisdictional issue is directed toward this faulty statement. (See EPA's Br. at 79-83.)[31] In fact, if the focus of the jurisdictional issue were on the argumentative point as stated by EPA in the foregoing quotation, petitioners would agree with the Agency. If one were to accept EPA's assertion that effluent limitations can be promulgated by regulation, it would make no sense to split review of limitations regulations from the effluent guidelines "regulations" which the limitations regulations would override. (In this event, EPA's guideline regulations under Section 304(b) virtually disappear anyway. EPA says it can find them in the "Development Document" and the "Economic Analysis" but aside from the fact that those books have no legal effect, the

[31] EPA restates the matter at one point as "Petitioners' proposal for bifurcated review." (*Id.* at 82.)

prospect of a court's having to search for "regulations" in those voluminous documents would bar any real review.)

Given this error in EPA's brief, petitioners in this reply brief will focus only on making a correct comparative statement of the positions of the parties.

A. Petitioners' Arguments

Petitioners argue as follows:

As a consequence of Assistant Administrator Kirk's well-publicized February 1974 memorandum,[32] petitioners recognized that "protective" petitions for review would have to be filed in a court of appeals. EPA had announced in the memorandum that it intended to claim that its regulations were limitations and to argue further that the 90-day time limitation in Section 509(b)(1) applied to such review. Petitioners filed such "protective" petitions in timely fashion in the Fourth Circuit. Those petitions are now before this Court as No. 75-1473.[33] Concurrently, petitioners filed a complaint in the U.S. District Court for the Western District of Virginia, seeking review of several of the same effluent regulations for which review was sought in the Fourth Circuit, but on the basis that EPA's regulations were guidelines issued under Section 304(b). This district court action has come before this Court as No. 75-978.

Respecting the "protective" petitions for review, petitioners have never questioned that the courts of appeals had jurisdiction to resolve their own jurisdiction. And to resolve the jurisdictional question, the structure of the statute and especially Section 509(b)(1) requires the court of appeals to consider the threshold question whether EPA can accord to itself by implication an authority to promulgate limita-

[32] See Pet. Br. at 20, citing and quoting from Memorandum from Alan G. Kirk, II, to Acting Assistant Administrator for Air and Water Programs, at 2, February 25, 1974, reproduced in BNA *Environment Reporter*, Current Developments, at 1833-1834 (March 1, 1974).

[33] A separate set of petitions for review of EPA's new source standards issued under Section 306 were timely filed in the Fourth Circuit. No jurisdictional question arises respecting those petitions, and they are before this Court in No. 75-1705, the EPA's cross-petition.

tions by regulation under Section 301(b). This Court's prior decisions so provide. See *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132 (1940); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206 (1968); *cf. National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 456 (1974); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Bell* v. *Hood*, 327 U.S. 678 (1946). If the court of appeals decided that under the Act EPA could draw upon implications and accord to itself a power to issue limitations by regulation, then it would take jurisdiction over the petitions and resolve all questions relating to the regulations. See, *e.g.*, *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027 (3d Cir. 1975). If the court of appeals decided that the Act required EPA to issue guidelines and not limitations, then it should dismiss the petitions for lack of jurisdiction, *CPC International Inc.* v. *Train*, 515 F.2d 1032 (8th Cir. 1975),[34] although it could conceivably exercise jurisdiction to review the guideline regulations either under an expansive reading of Section 509(b), *du Pont I* (App. 250), or, more preferably, under a pendent jurisdiction exercised where the parties had sought review of new source standards concurrently issued on the same record. *Romero* v. *International Terminal Co.*, 358 U.S. 354, 380-381 (1959); *cf. Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 216 n.16 (1968).[35]

[34] Review would then be had in a district court action. See, *e.g.*, *Grain Processing Corp.* v. *Train*, 407 F. Supp. 96 (S.D. Iowa 1976), *appeal pending*, No. 76-1233 (8th Cir.).

[35] EPA's brief seems to imply that the Administrator's mere assertion of authority to issue limitations by regulation grants power to the court of appeals to resolve all questions relating to a "protective" petition which pertains to such regulations. (EPA's Br. at 78-79.) EPA's brief states petitioners "apparently recognize" this position. (*Id.* at 79.) Petitioners do nothing of the sort. EPA's mere assertion grants to the court of appeals the power only to decide those matters necessary to resolving its own jurisdiction. Consideration and decision of all other matters of whatever nature must rest upon a prior determination that jurisdiction exists.

In this Court, petitioners adhere to the foregoing positions. (Pet. Br. at 85-96.) As a matter of emphasis, petitioners here argue that this Court (1) should follow the Act's mandate to issue guideline regulations under Section 304(b) and reject EPA's claim of power to issue limitations by regulation, and (2) should then construe the Act, and especially Section 509(b)(1), to allow courts of appeals to take pendent jurisdiction to review guideline regulations where the petitioning parties seek review of new source standards concurrently issued on the same administrative record.

Recognition of jurisdiction in courts of appeals based upon pendent jurisdiction would preserve the work of the court of appeals in *du Pont II* in reviewing painstakingly the record support for EPA's specific actions in the eleven of the twenty-two subcategories of the inorganic chemicals industry involved in this case. It would do so on a basis which would not involve an expansive reading of Section 509(b)(1). Such an expansive reading, as made by the court of appeals in *du Pont I* (App. 250), would create even more difficulty than that already present for other jurisdictional matters arising under Section 509(b)(1).[36]

[36] Section 509(b) is a procedural minefield. Even apart from the jurisdictional issue posed in this case, problems of interpreting the provision have plagued both district courts and courts of appeals. To date, four decisions have been rendered by the Second and Third Circuits construing Section 509(b) in factual situations other than that presented here, and in each case the court ruled that the would-be petitioner or plaintiff had started in the wrong court. In chronological order, those cases are: *Sun Enterprises, Ltd.* v. *Train*, 532 F.2d 280 (2d Cir. 1976) (district court has no jurisdiction to review EPA's issuance of a discharge permit; later-filed petition for review in court of appeals was barred by Act's 90-day time limitation on bringing such petitions); *Bethlehem Steel Corp.* v. *Environmental Protection Agency*, 538 F.2d 513 (2d Cir. 1976) (court of appeals does not have jurisdiction over petition to review EPA's action under Section 303 approving portion of New York's water quality standards); *Mianus River Preservation Committee* v. *Environmental Protection Agency*, ___F.2d___, 9 E.R.C. 1174 (2d Cir. 1976) (where the EPA failed to take affirmative action within 90 days under Section 402(d) to veto a discharge permit issued by Connecticut, the court of appeals does not have jurisdiction to review the issuance of the discharge permit); *American Iron & Steel Institute* v. *Environmental Protection Agency*, ___F.2d___, Nos. 75-2124 and 75-2128 (3d Cir.,

It would also expand the scope of the very harsh review-preclusion[37] and limitation clauses in Section 509(b),[38] to the detriment of the unsuspecting. See Pet. Br. at 92 n.79, discussing *Yakus* v. *United States*, 321 U.S. 414 (1944). On the other hand, exercise of pendent jurisdiction would allow the Court to serve the same interest in judicial economy expressed by Judge Widener in his opinion for the court of appeals in *du Pont I*, but without these adverse collateral consequences. Judge Widener's opinion noted that petitions to review new source standards had to be brought in courts of appeals under Section 509(b)(1)(A), and observed that review by district courts of guideline regulations could waste judicial manpower where the new source standards were issued on the same admin-

decided October 5, 1976) (court of appeals has no jurisdiction to review EPA's promulgation of Net-Gross Adjustment Regulations issued under Sections 402, 405 and 501 of the Act).

Of these cases, the *Mianus River* decision appears to be incorrect at least in part, because the "approving" language of Section 509(b)(1)(E) gives jurisdiction to a court of appeals to review a State-issued permit at least insofar as the Administrator's review of such a permit is concerned. (See Pet. Br. at 87; compare EPA's Br. at 42 n.28.) Petitioners in the *Mianus River* case argued for jurisdiction in the court of appeals on the ground that EPA's review of the permit, however perfunctory, was an "Administrator's action . . . in issuing . . . [a] permit" reviewable under § 509(b)(1)(F); the court did not consider or discuss the question whether the Administrator's action was reviewable under § 509(b)(1)(E) because EPA's action had the effect of "approving" the limitations in the permit.

[37] See Section 509(b)(2). Respecting a similar provision in the Clean Air Act, courts have held that the validity of an emission standard promulgated by EPA in the form of regulations is not reviewable in a criminal action for violation of the standard. *E.g., United States* v. *Adamo Wrecking Co.*, ___F.2d___, No. 75-1967 (6th Cir., decided November 1, 1976); *but cf. United States* v. *Independent Stave Co.*, 406 F. Supp. 886 (W.D.Mo. 1975).

[38] The requirement in Section 509(b)(1) that any petition for review of the actions there specified be brought within 90 days has been construed as a statute of limitations. See *Sun Enterprises, Ltd.* v. *Train*, 532 F.2d 280 (2d Cir. 1976). It might, however, more properly be considered a jurisdictional requirement. *Cf. Union Electric Co.* v. *Environmental Protection Agency*, ___U.S.___, 44 U.S.L.W. 5060, 5062-5063 & n.4 (June 25, 1976).

istrative record concurrently with the guideline regulations. (App. 249-250.) See Pet. Br. at 89-91.[39]

B. EPA's Arguments

EPA says that it has implied authority to promulgate effluent limitations by regulation under Section 301 and that under Section 509(b)(1)(E) review of such regulations is exclusively in the courts of appeals. (EPA's Br. at 78.)[40]

In the main, the remainder of EPA's argument on jurisdiction is irrelevant, resting as it does on a misstatement of petitioners' arguments.

EPA does include a long footnote setting out the numerous cases various parties have brought in district courts to review EPA's regulations for existing plants, on the basis that those regulations are guideline regulations issued under Section 304(b). (See EPA's Br. at 83-84 n.57)[41]

In another long footnote, EPA addresses itself to petitioners' arguments directed toward exercise by courts of appeals of a pendent jurisdiction. (See EPA's Br. at 85, 86 n.59.) EPA says, among other things, "we agree that it would be inappropriate to vacate the judgment of the court of appeals insofar as it made those modifications in the effluent limitations [or guidelines, depending upon one's views] and remand the case to the district court to consider those issues." (*Id.* at 86 n.59.) Beyond setting out the

[39] EPA's brief ignores entirely the divided-review considerations expressed in Judge Widener's opinion. Compare EPA's Br. at 79-83, where EPA addresses at great length the false divided-review issue involving the Section 304(b) regulations and regulations implied from Section 301(b), which rests on EPA's misstatement of petitioners' arguments. See *supra*, at 38-41.

[40] Assuming *arguendo* that the premise is correct, petitioners would not contest the conclusion, even as to and including guideline regulations. See *supra*, at 38.

[41] Respecting EPA's footnote, petitioners would add to EPA's enumeration one further district court case: *Delicate, et al.* v. *Train*, Civil Action No. 76-5028 (D.S.D., complaint filed April 15, 1976) (ore mining and dressing regulations).

foregoing quotation, petitioners will not attempt to restate EPA's views on pendent jurisdiction.

C. Congressional Action To Date

Congress could resolve for the future the jurisdictional issue in these cases by amending the Act to specify the forum in which actions to review EPA's guideline regulations could be brought. Congress in 1973 made such an amendment to Section 509(b) to specify that actions to review pretreatment standards promulgated under Section 307 could be brought in the courts of appeals. See Pub. L. 93-207, 87 Stat. 906, § 1(6) (December 28, 1973), amending Section 509(b)(1)(C).

Earlier this year, on June 3, 1976, the House of Representatives passed a bill which would have amended the Act to provide that review of guideline regulations issued under Section 304(b) was in the courts of appeals under the terms of Section 509(b)(1). See 122 Cong. Rec. H 5285-5288 (daily ed. June 3, 1976) (passage of House version of S. 2710, 94th Cong., 1st Sess. (1975), section 18 of which would have amended Section 509 of the Act). The bill did not go immediately to a Conference Committee. Rather, on September 1, 1976, the Senate considered and adopted a motion to concur in the House amendments to S. 2710, with further amendments. (122 Cong. Rec. S 15189 (daily ed. September 1, 1976).) Among other things, the Senate stripped from the bill a variety of provisions including the House-passed Section 18 which would have given jurisdiction to courts of appeals to review by petition EPA's promulgation of guideline regulations under Section 304(b). See 122 Cong. Rec. S 15165 (daily ed. September 1, 1976) (the cited summary of "Provisions Of House Amendment Not Adopted By Committee" wrongly states the effect of the House-passed Section 18). Thereafter, agreement could not be reached on the different versions of S. 2710 passed by the Senate and House, and the bill died upon the adjournment of the 94th Congress.

The jurisdictional issue thus remains in these cases, both as to previously-filed actions and as to actions which may be brought in the future.

CONCLUSION

In this case, and the companion cases—Nos. 75-1473 and 75-1705, the issues of statutory construction concern a very detailed statute filled with cross-references and dependent phrases and clauses. Similarly, the Court has before it a large administrative record which sets out in considerable detail EPA's step-by-step actions in issuing the regulations before the Court, and in so doing, in arriving at the position it now espouses. These cases are quite complex because of EPA's efforts to evade or avoid the express commands of Section 304(b), but the Court has the great advantage of having before it the materials necessary to reach its decision.

These cases are unusual in that the issues as to the effect and content both of the guideline regulations and of the new source standards are before this Court just as EPA has launched a new program to review, revise, and reissue *inter alia* the 1983-step regulations and the new source standards for 21 broad industry categories, including inorganic chemicals manufacturing. This program to review and reissue the regulations is apart from and in addition to review on remand of the regulations in this case, and in other similar cases. On June 7, 1976, EPA entered into an agreement with the Natural Resources Defense Council, Inc. and others to settle four cases pending in the District Court for the District of Columbia. See *Natural Resources Defense Council, Inc.* v. *Train*, ——*F.Supp.*——, 8 ERC 2120 (D.D.C. 1976).[42] The settlement agreement, which was approved by the Court, provides a timetable under

[42] The text of the settlement agreement providing the detailed program for issuing the new regulations is set out as an addendum to the district court's opinion. (*Id.*, 8 E.R.C. at 2122-2136.) Under the terms of the agreement, the revised guideline regulations and new source standards for the inorganic chemicals category are to be promulgated in final form no later than December 31, 1978. (*Id.*, 8 E.R.C. at 2125, 2131.)

which EPA will study the 21 broad industry categories and then propose and issue the new 1983-step and new source regulations. Under the timetable, the entire process is to be concluded and the new regulations are to be issued for all 21 categories by December 1979. (*Id.*, 8 E.R.C. at 2125-2126.) The decision of this Court, therefore, will resolve basic questions respecting the effect and content of the new regulations before they are formulated, rather than after vast amounts of administrative and private-party time and effort have been expended in developing new regulations based on EPA's faulty legal theory.

Several days before the filing of this brief, one further development occurred which has a bearing on this litigation. Without prior announcement or notice, EPA promulgated a series of "specialized definitions" in an "interim final amendment" to its regulations for the inorganic chemicals category. (41 Fed. Reg. 51598-51601 (November 23, 1976).) Among other things, the "specialized definitions" set out yet a new meaning for "effluent limitations."[43] This new definition also fails to comply with the statute. While the definition does provide that effluent limitations may be established by States as well as EPA, the definition omits any reference to "schedules of compliance." The statutory definition in Section 502(11) specified that effluent limitations "includ[e] schedules of compliance."

[43] In *du Pont II* the court of appeals set aside EPA's general regulation defining "effluent limitations" for all industrial categories, on the grounds that EPA's definitions did not provide for such limitations to be established by States as the statute required and also that the definition did not square with "presumptively applicable" limitation regulations. See *supra*, at 21-22 & n.21.

Petitioners had timely petitioned for review of EPA's general regulations in 40 C.F.R. Part 401, in addition to the regulations specifically relating to the inorganic chemicals category, 40 C.F.R. Part 415. (See, *e.g.*, App. 200-201.) The court of appeals thus had jurisdiction to set aside the general definition of "effluent limitation" in the regulations. (See App. 262, 284.) EPA errs when in the most recent rulemaking notice it asserted that the court of appeals had remanded certain "definitions as they pertain to portions of the Inorganic Chemicals Manufacturing Point Source Category . . . ." (41 *Fed. Reg.* 51598 (November 23, 1976).) The action by the court of appeals was not so limited.

Even putting aside the contradiction between the new definition and the statute, this most recent action by EPA underscores the Agency's efforts to reduce the role of States in carrying out the Act. In EPA's brief, much was made of the fact that States still could set schedules of compliance. (See EPA's Br. at 71-72.) Relegating States to setting schedules of compliance does not satisfy the congressional intention "to recognize [and] preserve . . . the primary responsibilities and rights of States" to control discharges. (§ 101 (b).) The newest regulations, by omitting any reference even to the schedule-of-compliance function, raise additional doubts as to the role which EPA would allot to States.

Petitioners' proposed disposition of these cases is set forth in Pet. Br. at 96-97.

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